

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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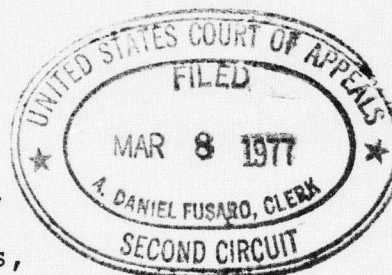
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To be argued by

JEROLD OSHINSKY

In the
UNITED STATES COURT OF APPEALS
For The Second Circuit



BROWNING DEBENTURE HOLDERS' COMMITTEE, et al.,

Plaintiffs-Appellants,

-against-

DASA CORPORATION, et al.,

Defendants-Appellees.

BRIEF OF PLAINTIFF-APPELLANT
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Appeal No.

BROWNING DEBENTURE HOLDERS' COMMITTEE,
et al.,

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-against-

DASA CORPORATION, et al.,

Defendants-Appellees.

BRIEF OF PLAINTIFF-APPELLANT
SIMMS C. BROWNING

Preliminary Statement

The appellant Simms C. Browning ("Browning"), appeals from the Judgment of the United States District Court for the Southern District of New York by the Honorable Richard Owen assessing attorneys' fees against Browning and in favor of defendant Arthur Andersen & Co. ("Andersen"). The action has been settled as between Browning and the other defendants.

On January 8, 1976, the Court below held that the action had been instituted and maintained in bad faith and that defendant-appellees DASA and The Bank of New York should be reimbursed for legal fees and costs and disburse-

ments. Andersen then also sought an order requiring plaintiffs below to pay its legal fees and costs and disbursements.

Until January 28, 1976, Browning was represented by Bradley Brewer, Esq. Because of the obvious conflict in interest between Bradley Brewer and Browning in view of Judge Owen's January 8, 1976 order, this firm was substituted as counsel for Browning on January 28, 1976 and immediately sought reargument to the extent that Browning's good faith was questioned and to the extent the Court determined to award attorneys' fees against Browning.

In support of his position, Browning submitted an extensive affidavit which established his good faith belief in the bona fides of his claim and his total lack of meaningful involvement in the procedural and discovery aspect of the case. Browning's lack of involvement was conceded by attorney Brewer. In addition, the legal theories pursued by Browning's new counsel on appeal also were presented for consideration but not discussed in the decisions below, except that the Court below would not allocate responsibility for attorneys' fees.

Although the Court below granted reargument, it adhered to its original opinion holding Browning liable together with Roy Brewer and Bradley Brewer and further held that no hearing on the issue of Browning's good faith

was required since such alleged good faith was held to be immaterial.

Subsequently, after the submission of affidavits of legal services with supporting documentation, including bills to clients by plaintiff, the Court, after a hearing awarded attorneys' fees, including Andersen against Browning. According to Judge Owen, the award was based upon an "utterly meritless cause of action" and "numerous motions" involving Andersen even following dismissal of the claims against it.

Issues Presented for Review

I. Whether good faith reliance upon advice of counsel is a defense to assessment of attorneys' fees for a claim in the nature of alleged malicious prosecution.

II. Whether the district court erred in holding that Browning's good faith was immaterial and refusing to hold a hearing on that issue.

III. Whether the securities laws authorize attorneys' fees against Browning in this case.

IV. Whether an award of attorneys' fees against a plaintiff who filed a claim in good faith violates his First Amendment constitutional right to petition.

V. Whether liability for the attorneys' fees should have been allocated.

STATEMENT OF THE CASE

Appellant Browning will limit his statement of the case to matters directly affecting him since other parties undoubtedly will state the case in its entirety.

The facts applicable to Browning's appeal are simple and essentially not in dispute. Browning submitted a grievance to an attorney who advised Browning he had legal remedies. Browning, not an attorney and unsophisticated in legal matters, necessarily relied upon his attorney's advice.

Mr. Browning's personal good faith has not been challenged. Browning remains in this case simply because the total conduct of his attorney was found to warrant the imposition of attorneys' fees and imputed to Browning by the Court below.* This finding was rendered notwithstanding the District Court's statement that "in an affidavit accompanying his motions, Bradley Brewer took full responsibility as counsel, for the procedural conduct of the suit" (Memorandum and Order, July 23, 1976, p. 2, n. 3).

*A detailed statement of Browning's position is set forth in his affidavit of February 13, 1976.

Browning owned debentures in DASA Corporation. He was concerned about certain actions taken by various persons affecting DASA including Andersen. Since he was not a lawyer he sought legal advice. The lawyer, Brewer, told him he had legal remedies available. Browning necessarily relied upon his attorney's advice. And that is all that Browning did! His personal good faith is not in issue and has not been challenged. Simply, the Court below imputed to Browning allegedly improper conduct by his attorney in the conduct of the suit as the sole basis for the imposition of punitive attorneys' fees. Browning contends that he cannot be held liable for attorneys' fees, as to which he had no responsibility, by attribution.

Mr. Browning's grievances which he presented in his capacity as a debenture holder to Mr. Brewer presented potential legal claims which he believed in good faith. Even if he was wrong, this does not amount to oppressive and vexatious conduct on the part of Mr. Browning and does not warrant an assessment of attorneys' fees against him. Good faith should be conclusively presumed where a client acts upon advice of counsel. Further, if the award of attorneys' fees against Browning stands, many otherwise

valid claims in developing areas might not be filed since the attorney might fear that his client could be assessed attorneys' fees if the Court later disagreed with the attorney's legal judgment or conduct of the litigation.

Analysis of this Court's opinion shows that the major basis of the Court's determination rests in the conduct of the litigation by Mr. Brewer. There is no justification for punishing Mr. Browning for his attorney's conduct. This point is conceded by Mr. Brewer in his affidavits of January 20 and 27, 1976. Mr. Browning could not and did not judge whether procedural steps should or should not be taken and cannot be assessed with attorneys' fees because the Court below found that his attorney acted overzealously or even improperly.

ARGUMENT

I

AN AWARD OF ATTORNEYS' FEES
AGAINST BROWNING IS INAPPRO-
PRIATE SINCE HE RELIED IN
GOOD FAITH UPON HIS ATTOR-
NEY'S ADVICE

A. There Is No Basis For An
Award Of Attorneys' Fees
Against Browning

The American rule disfavors an award of attorneys' fees in the absence of statutory authorization or contract. In rare cases attorneys' fees have been assessed where the Court specifically determines that a particular party (usually a defendant or attorney) has acted oppressively, vexatiously and in bad faith. Browning's conduct and behavior during the prosecution of this case demonstrates that he acted in good faith in setting forth the facts supporting his contentions of wrongdoing and that he relied upon his attorneys' advice as to the legal remedies available to redress his factual grievances. Under these circumstances, he may not be held liable for punitive attorneys' fees.

The Court's award of attorneys' fees seemingly is based upon the Court's conclusion that the procedural

tactics employed by attorney Brewer in the prosecution of the case were oppressive, that the case lacked substantive merit and that this may be attributed to a layman whose actual good faith was held to be irrelevant.

There is no assertion in any of the decisions rendered by the district judges involved in this case that Browning misrepresented any facts to the Court or personally acted in bad faith.

B. Mr. Brewer Admits His Sole
Responsibility For The
Procedural Conduct Of The
Case

Plaintiff's attorney during the prosecution of this action, Bradley Brewer, submitted two affidavits dated January 20 and 27, 1976 in opposition to the application for attorneys' fees submitted by DASA, the indenture trustee and Andersen. In these affidavits Brewer admitted that he had exclusive control over the procedural conduct of the case and accepted full responsibility for those matters. The Court below made a finding that Mr. Brewer accepted such responsibility. Mr. Brewer reiterated his responsibility in open Court on November 22, 1976.

In his affidavit submitted in opposition to DASA's application for attorneys' fees, dated January 20,

1976, Mr. Brewer stated that since the District Court's finding of "vexatiousness" appeared to relate exclusively to his actions as an attorney, a judgment for attorneys' fees should only be entered against him:

"If the 'bad faith' and 'vexatiousness' complained of in the court's January 8 opinion relate exclusively to me as an attorney and not to either Browning or Roy Brewer (as appears to be the case), then I submit that entry of a judgment against them is incorrect, and I should be the only person named in the judgment entered. . . ."

Similarly, in his January 27, 1976 affidavit in opposition to the indenture trustee and Andersen applications, Mr. Brewer admitted that any procedural matters engaged upon were conducted independently of Browning's influence and accepted sole responsibility for all procedural matters in the case:

"where a matter in the conduct of an action is purely procedural in nature, the attorney's judgment should remain independent of his client, and the client's influence as well as his responsibility, should be limited and minimal. Here neither Browning nor Roy Brewer should be taxed with any attorneys' fees of any defendant for services related to any procedural matters."

Thus, the affidavits of Browning's former counsel, Bradley Brewer, amply supported Browning's contention that he was not involved in any way in the procedural aspects of the case. Since Browning's non-involvement in procedural

matters is beyond dispute, Browning submits that he cannot be held liable for those procedural matters. Hence, punitive attorneys' fees should not be assessed against him.

C. Browning Reasonably Believed
That His Claims Had Merit

The factual background concerning Browning's limited involvement in the institution and prosecution of this suit are fully detailed and discussed in his affidavit of February 13, 1976. That background shows that Browning supported the institution of the suit and had almost nothing further to do with the conduct of the case until the trial. Browning, who is not a lawyer, honestly believed in good faith that he had cognizable grievances and left the handling of his case to his attorney.

Browning specifically asked Mr. Brewer whether he had claims for relief and Mr. Brewer responded affirmatively. Browning has not and cannot be charged with factual misrepresentations and thus reliance upon his attorney's advice is dispositive.

The Court's holding that Browning is liable for attorneys' fees is tantamount to a finding that Browning is liable for punitive costs under a theory of malicious prosecution. Under the applicable law, however, reliance on advice of counsel after full disclosure of the facts is

a good defense to such an action:

"Advice of counsel may be shown in defense to an action for malicious prosecution where it appears that the prosecution was instituted in reliance in good faith on such advice, given after a full and fair statement of all facts to the attorney, since it bears on the elements of probable cause and malice. Proof of advice of counsel is material to show the nonexistence of the malice essential to sustain an action for malicious prosecution" 36 N.Y. Jur. Malicious Prosecution §55, pp. 328-29 (footnote omitted).

In Weidlich v. Weidlich, 30 N.Y.S.2d 326 (Sup. Ct. 1941), in reliance upon established authority, the court dismissed a complaint alleging malicious prosecution of an action by the defendant on the ground that the defendant's honest reliance upon advice of counsel demonstrated that the suit was actuated by a bona fide belief that she had probable cause to institute the suit. Under such circumstances the court concluded that the action was not actuated by malice and dismissed the complaint on the merits:

"If the defendant believed, in good faith, after obtaining legal advice that she could become legally domiciled and resident in Nevada and possessed legal ground and probable cause to institute suit for divorce against the plaintiff under the laws of that state, and relied thereon and was induced to act upon such belief, she is immune to an action for a malicious prosecution. Such is the claim and defense here and necessarily

introduces a question of fact. In the Hall case the court said (page 88 of 6 Barb.): 'If a party lays the facts of his case fully and fairly before counsel, and acts in good faith, upon the opinion given him by such counsel (however erroneous that opinion may be), it is sufficient evidence of a probable cause, and is a good defense to an action for a malicious prosecution, or for a malicious arrest.' See, also, Rawson v. Leggett, 184 N.Y. 504, 512, 77 N.E. 662; Giesener v. Healy, 86 Misc. 16, 147 N.Y.S. 936; Laird v. Taylor, 66 Barb. 139, 143." (30 N.Y.S.2d at 332-333)

Browning contends that since reliance on advice of counsel constitutes a valid defense to an action for malicious prosecution, an essential element of which is malice, such reliance should also negate this Court's finding that Browning should be personally liable for attorneys' fees based on any alleged bad faith in the prosecution of this action.

Judge Bonsal, faced with the same issue in Gardner v. Nizer, 185 U.S.P.Q. 485 (S.D.N.Y. 1975), reached the result advocated here by Browning and contrary to the holding of Judge Owen. There, although Judge Bonsal originally had authorized attorneys' fees to a victorious defendant on the ground the suit was "unreasonable", he denied the subsequent applications for attorneys' fees since the plaintiff there had brought the action in good faith and in reliance upon advice of counsel.

Faced with the question whether punitive damages should be imposed, the New York Court of Appeals held in Gordon v. Nationwide Mutual Ins. Co., 30 N.Y.2d 427, 433, 334 N.Y.S.2d 601, 605 (1972):

"It would be an extraordinary result to hold a client guilty of breach of good faith, with large punitive damages, because it acts on advice of counsel -- even mistaken advice"

Yet that "extraordinary" result is presented on this appeal.

The District Court's reliance upon Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962), is completely misplaced in light of the foregoing authorities. Link raised the question whether a dismissal of a complaint, resulting from an attorney's neglect in failing to attend a pretrial conference, could be set aside under Rule 60(b) of the Federal Rules of Civil Procedure. It did not involve the imposition of damages upon a party because of his attorney's alleged misconduct.

This Circuit has not applied the Link rationale where justice dictated a contrary result. In Peterson v. Tern Taxi, Inc., 429 F.2d 888 (2d Cir. 1970), an order of dismissal for alleged failure to prosecute was reversed

since "justice requires that [plaintiff] be given a fair hearing on his claim" (429 F.2d at 892). Browning likewise was entitled to a hearing on his good faith which the District Court incorrectly refused.

D. Browning Cannot Be Assessed Punitive Attorneys' Fees For the Procedural Tactics Of His Attorney As To Which He Had No Knowledge Or Control

As stated previously, the primary rationale for the decision to award attorneys' fees is the procedural conduct of the case. Browning had no advance knowledge of the procedural tactics employed by his attorney and had no control over those tactics. Indeed, more than once, Browning advised attorney Brewer that he wished to withdraw from the action and remained in the case based upon Mr. Brewer's legal advice that the claims should be pursued.

Browning was involved in the institution of the case and had very little further involvement until the trial. At that time, Browning's judgment was influenced by the extensive preparation apparently performed by his attorney, including an extensive outline of testimony

prepared by a well-known expert who agreed with Mr. Browning's view of the case. Under these circumstances, Browning concluded that it was proper for him to testify about the undisputed factual background. Browning has never been accused of misstating any facts. The issues center on whether those facts give rise to liability under the law. Browning cannot be held liable because the Court below found that there was no legal basis for the claims.

In Hall v. Cole, 412 U.S. 1 (1972), the Supreme Court acknowledged that attorneys' fees may in unusual circumstances be taxed on an unsuccessful litigant who acts "in bad faith, vexatiously, wantonly, or for oppressive reasons", and recognized that such punitive measures are based upon the existence of bad faith:

"In this class of cases, the underlying rationale of 'fee shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant". Id. at 5.

Browning has shown that his conduct throughout the institution and prosecution of this case demonstrates that he acted in the utmost good faith. Furthermore, the District Court's decisions are void of any finding, and

there is no basis for one, that Browning personally acted vexatiously or in bad faith in connection with these proceedings.

II

THE SECURITIES LAWS DO NOT AUTHORIZE ATTORNEYS' FEES IN THIS CASE

There is no authority for the imposition of attorneys' fees in securities cases without statutory or other compelling authority.

The federal securities laws provide for the imposition of attorneys' fees in limited circumstances. Clearly the legislature's failure to provide for such awards under the sections involved here, demonstrates a determination not to authorize attorneys' fees across-the-board. In fact, the courts have recognized that the awarding of attorneys' fees to defendants in federal securities laws cases is unusual:

"[I]t is unusual to award such fees to defendants in actions brought under the securities laws because plaintiffs, in bringing such actions, perform a therapeutic service even though it may develop during the course of the litigation that the premises on which they base their actions are without foundation." The Stratton Group, Ltd. v. Chelsea National Bank, 54 F.R.D. 227, 228 (S.D.N.Y. 1972).

In securities cases in which attorneys' fees have been awarded, the enabling authority for such awards appear to have been statutes permitting fee awards in derivative suits or case law involving class actions.

The situation presented in this case is closer

to that in Colonial Realty Corp. v. Brunswick Corp., 337 F. Supp. 546 (S.D.N.Y. 1971) where defendants were denied attorneys' fees notwithstanding specific statutory authorization under §11(e) of the Securities Act of 1933 and §§9(e) and 18(a) of the Securities and Exchange Act of 1934. Section 11(e) provides that the Court may assess costs, including attorneys' fees against a litigant if the Court believes the suit to have been without merit. The Court in Colonial Realty held that since there was no specific finding of bad faith or frivolity, defendants would not be awarded attorneys' fees where plaintiff was unsuccessful in prosecuting its claim:

"'[A]lthough we held plaintiff's evidence insufficient, we cannot say that the action was entirely frivolous'. . . Therefore, although judgment is granted to defendants, their motion for attorneys' fees is denied" (337 F. Supp. at 553).

Even in Katz v. Delka Research Corp., 295 F. Supp. 647 (S.D.N.Y. 1968), aff'd in part and reversed in part, sub nom, Katz v. Amos Treat & Co., 411 F.2d 1046 (2d Cir. 1969), where the Court granted a directed verdict because of plaintiff's failure of proof, a motion for attorneys' fees was denied. Despite the Court's finding that plaintiff had alleged "nothing but vague assertions and conclusions" and was "unable to show any evidence

whatsoever", the Court held that plaintiff's failure of proof was "not enough to support a finding that the action was frivolous or that it was brought in bad faith" (295 F. Supp. at 649).

Where attorneys' fees have been imposed on unsuccessful plaintiffs under Section 11(e) the amount of such awards have been minimal. Thus, in Klein v. Shields & Co., 470 F.2d 1347 (2d Cir. 1972) defendant's attorneys applied for \$4,000 in attorneys' fees; even an award of \$600 was remanded for further findings.

Browning submits that the allowance of attorneys' fees by the District Court against the unsuccessful litigants in this case conflicts with legislative intent. In fact, the taxing of attorneys' fees against plaintiffs in securities litigation without statutory authority would contravene the purposes and intent of those statutes by inhibiting the enforcement of its provisions by private litigants. There are many well-known securities cases in which points of first impression were asserted. Some or all of those cases might not have been filed had the

plaintiff faced the spectre of punitive attorneys' fees
had the claims been dismissed.

III

NOERR-PENNINGTON PRECLUDES THE AWARD OF ATTORNEYS' FEES AGAINST A PLAINTIFF WHO FILES A CLAIM IN GOOD FAITH

Browning's constitutional rights under the First Amendment to petition this Court for redress of his grievances immunizes him from the taxing of punitive attorneys' fees against him. In Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965), the Supreme Court held that the right to petition for legislative relief was protected by the Bill of Rights and could not be abridged by the imposition of anti-trust law liabilities as a result of such conduct. Noerr thus made clear that even the improper purpose and motive of a party in bringing an action before a governmental body does not give rise to an actionable wrong. In Noerr, the Supreme Court assumed that the motive and purpose of the defendant railroads in seeking governmental action was vicious, corrupt and venal and that their specific purpose was to destroy the trucking business of plaintiffs and to impair the relationship existing between the plaintiff truckers and their

customers. Yet even when faced with such extreme facts, the Supreme Court held that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." (365 U.S. at 136).

The Supreme Court subsequently made it clear that the First Amendment underpinnings of the Noerr-Pennington doctrine apply with equal force to the institution of administrative or judicial proceedings, holding that the philosophy of Noerr-Pennington:

" . . . governs the approach of citizens or groups of them to administrative agencies (which are both creations of the legislature, and arms of the executive) and to courts, the third branch of Government. The right of access to the courts is indeed but one aspect of the right of petition. See Johnson v. Avery, 393 U.S. 483, 485; Ex parte Hull, 312 U.S. 546, 549." California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

Under the rationale of these cases, punitive attorneys' fees may not be imposed against Browning since that would defeat the constitutional immunities underscored in these cases.

The only exception to the immunity conferred by the Noerr-Pennington doctrine arises where the alleged

conduct under challenge is a total "sham." The Supreme Court has defined the "sham" exception solely to embrace abuse of administrative process, such as perjury, bribery, falsification of fact or the institution of numerous and repetitive actions, each knowingly having no possible legal basis, whose purpose is "to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process." Trucking Unlimited, supra, 404 U.S. at 512. None of those factors are present here.

These same principles have been applied in non-antitrust cases as well. In Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972) the plaintiffs successfully moved to dismiss counterclaims alleging that "plaintiffs by various acts induced or sought to induce a department of the federal government to take certain actions" (349 F. Supp. at 939). The Court granted the motion to dismiss for failure to state a claim upon which relief could be granted and rejected defendants' tort claim holding that the right of the people to petition for redress of their grievances could not properly be made to depend upon their intent in doing so:

"This court believes that the malice standard invites intimidation of all who seek redress from the government; malice is easy to allege under modern pleading rules such as those of the federal courts and therefore in most cases even those who acted without malice would be put to the burden and expense of defending a lawsuit. Thus, the malice standard does not supply the 'breathing space' that First Amendment freedoms need to survive." (349 F. Supp. at 938) (footnote omitted)

Thus, the teachings of Noerr-Pennington and its progeny make clear that plaintiffs have a constitutional right to petition the courts for redress even if motivated by malice as long as they do not knowingly prosecute sham actions. Andersen has not asserted that Browning knowingly had brought a sham cause of action. Furthermore, there is no finding by any of the judges who have been involved in this action that Browning has misstated any facts which led to an unlawful result. Under these circumstances, the imposition of punitive attorneys' fees in this case would violate Browning's constitutional right to petition the court for redress of his grievances which he honestly viewed as bona fide.

IV

AT MOST, ONLY NOMINAL ATTOR-
NEYS' FEES SHOULD BE AWARDED

Browning submits that no attorneys' fees should be assessed against him. At most, only nominal fees should be awarded. The sanctions provided under Rule 37 of the Federal Rules of Civil Procedure for the awarding of reasonable expenses, including attorneys' fees, in motion practice concerning discovery are useful analogies. In exercising the authority provided by Rule 37, the courts usually award nominal fees and attorneys have been required, on occasion, to bear the payment themselves. See Braziller v. Lind, 32 F.R.D. 367 (S.D.N.Y. 1963) (\$100 including attorneys' fees); Osolin v. SS Colorado, 1 F.R.Serv.2d 599 (N.D. Cal. 1958) (\$250 as expenses and attorneys' fees); Lizza & Sons, Inc. v. Diminico & Pallotta, Inc., 23 F.R.D. 143 (D. Mass. 1959) (\$25 including attorneys' fees); White v. Beloginis, 53 F.R.D. 480 (S.D.N.Y. 1971) (\$100 in expenses); Rovico Engineering Corp. v. Old Town Corp., 17 F.R.Serv.2d 354 (E.D.N.Y. 1973) (\$150 in attorneys' fees); Brunswick Corp. v. Chrysler Corp., 291 F. Supp. 118 (E.D. Wisc. 1968) (\$100 in expenses and \$200 as attorneys' fees); Humphreys

Exterminating Company Inc. v. Poulter, 62 F.R.D. 392 (D. Md. 1974) (\$250 in attorneys' fees); Bernat v. Pennsylvania R. Co., 14 F.R.D. 465 (E.D. Pa. 1965) (\$50 in attorneys' fees); Palma v. Lake Waukomis Development Co., 48 F.R.D. 366 (W.D. Mo. 1970) (\$100 in attorneys' fees). Therefore, in the event that this court determines to uphold attorneys' fees resulting from unsuccessful motion and discovery practices, that award should only be nominal in amount.

In Whitehouse Investments Limited v. Bernstein, 51 F.R.D. 163 (S.D.N.Y. 1970) the Court found that plaintiff's motions for discovery were not substantially justified and held that defendants were entitled to costs and reasonable attorneys' fees incurred in their successful disposition to its motions. Defendants' attorney submitted an affidavit to the Court stating that \$8,400 in billing time, \$150 in copying charges and \$34.00 in overtime had been incurred in opposing the motion. The affidavit further indicated that approximately 140 hours of the attorneys' time had been spent at an hourly rate charged at \$60.00 per hour. The Court, however, only awarded \$100 in costs and \$400 in attorneys' fees, noting that:

". . . no precedent is intended to be set which would dissuade an attorney from diligently pursuing that discovery to which he believes he is entitled or justifiably resorting to this or any other court of coordinate jurisdiction in order to settle legitimate and earnest disputes occasioned thereby." (51 F.R.D. at 167, n. 11)

Any award of attorneys' fees against Browning greater than a nominal amount would set a precedent which would be counterproductive to the administration of justice by inhibiting attorneys from diligently pursuing motion practice in an effort to expedite the disposition of claims.

V

THE COURT SHOULD ALLOCATE LIABILITY BETWEEN BROWNING AND
BREWER

In the event Browning's appeal is not sustained in its entirety, the Court should allocate liability between Browning and attorney Brewer. If the case is remanded, the District Court should be instructed to allocate liability.

The framework for allocation is established by Article 14 of New York's Civil Practice Law and Rules. Section 1401 provides that two or more tortfeasors may claim contribution for damages. Section 1402 says that "no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution."

It is plain that the overwhelming majority of the damages sought relate to the procedural conduct of the case. Mr. Browning's former counsel, Bradley Brewer, has acknowledged full responsibility for such conduct, reiterated his responsibility in open Court on November 22, 1976 and an allocation should be rendered which imposes upon Mr. Brewer responsibility for the vast portion of Andersen's \$7,000 award.

Section 1401 applies to claims for "personal injury" and New York General Construction Law Section 37-a defines "personal injury" to include claims for malicious prosecution.

Allocation has been authorized in cases under the securities laws. In Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112 (S.D.N.Y. 1974), aff'd CCH [Current] Fed. Sec. L. Rptr. ¶95,660 (2d Cir. 1976) and Globus v. Law Research Service, Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), aff'd, 442 F.2d 1346 (2d Cir.), cert. denied, 404 U.S. 941 (1971), the courts directed pro rata allocations among securities tortfeasors determined to have been equally culpable, finding that policy considerations regarding securities law judgments favored such pro rata treatment.

In Gould v. American-Hawaiian Steamship Company, 387 F. Supp. 163 (D. Del. 1974), the Court invoked a comparative measure of allocation, even in a securities case. Here, under New York law, the equitable shares should be determined in accordance with relative culpability. See Dole v. Dow Chemical Company, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972);

Estate of Canale v. Binghamton Amusement Co., 45 App. Div. 2d 424, 357 N.Y.S.2d 931 (3rd Dept. 1974), aff'd, 37 N.Y.2d 875, 378 N.Y.S.2d 362 (1975) (25%-75% - apportionment of damages among joint tortfeasors based on relative fault); Adams v. Lindsay, 77 Misc.2d 824, 354 N.Y.S.2d 356 (Sup. Ct. 1974) (70%-30% - apportionment of damages between defendant and third-party plaintiff and third-party defendant based on relative fault); Berliner v. Kacov, 79 Misc.2d 891, 361 N.Y.S.2d 477 (Sup. Ct. 1974), modified, 51 App. Div.2d 962, 380 N.Y.S.2d 722 (2d Dept. 1976) (85%-15% - apportionment of damages between defendant based on relative fault).

Pursuant to the foregoing, Browning respectfully requests that the Court below should have allocated a very small percentage of liability to his "relative culpability", if any, for the Andersen claim.

CONCLUSION

For the reasons stated herein, the decision of the Court below should be reversed as to Browning and the award in favor of Andersen should be set aside. Alterna-

tively, the case should be remanded for a hearing on the question of Browning's good faith.

Respectfully submitted,

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STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

ANNE FITZGERALD, being duly sworn, deposes and says:

I am employed by Anderson Russell Kill & Olick, P.C.,
am over the age of 18 and reside in the State of New York.

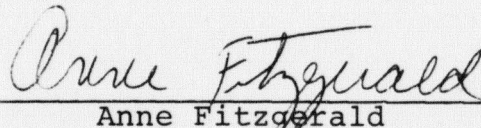
On March 8, 1977 I mailed a copy of the within
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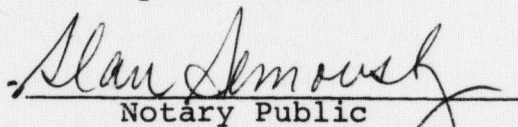
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Sworn to before me this
7th day of March, 1977.


Notary Public

ALAN SIMONS
Notary Public, State of New York
No. 21444-0000
Qualified in New York County
Commission Expires March 30, 1977

